89-787 (1)

Supreme Court, U.S.
FILED
NOV 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT E. HEDICKE,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

NORMAN N. ROSEN
Attorney for Petitioner
120 North Florence
El Paso, Texas 79901
(915) 532-3644

27 pp

STATEMENT OF QUESTIONS PRESENTED

This case presents the question of interpretation of a state statute so as to prevent a defendant from introducing evidence which is normally admissible. The facts concern the exclusion of character evidence during the sentencing portion of trial in violation of due process and fundamental notions of a fair trial.

TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED I

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

CITATION TO OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 7

THE QUESTION PRESENTED IS SUBSTANTIAL .. 10

PRESERVATION OF CONSTITUTIONAL QUESTION 12

ARGUMENT FOR GRANTING PETITION 16

REQUEST FOR RELIEF 23

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

CASES OF THE UNITED STATES SUPREME COURT:

Chambers v. Mississippi
410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 11

Green v. Georgia
442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) 11, 21

Jurek v. Texas
428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929

(1976) 11, 14, 20

Washington v. Texas
388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019

(1967) 11, 21

Webb v. Texas
409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972) . 11, 16, 21

CASES OF THE TEXAS COURT OF CRIMINAL APPEALS:

Cass v. State
676 S.W.2d 589, (Tex.Cr.App. 1984) 13

Murphy v. State
777 S.W.2d 44, (Tex.Cr.App. 1989) 13-15, 18, 19, 21-23

Purtell v. State
761 S.W.2d 360, (1988) 18

Robinson v. State
548 S.W.2d 63 (Tex.Cr.App. 1977) 13, 20

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT E. HEDICKE,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

Petition for Writ of Certiorari
To the Court of Criminal Appeals of Texas

TO THE HONORABLE JUSTICES
OF THE UNITED STATES SUPREME COURT:

COMES NOW the Petitioner, by and through his attorney, and petitions the Court to issue its Writ of Certiorari to the Court of Criminal Appeals of the State of Texas. As grounds

therefor, Petitioner would respectfully show to the Court as follows:

CITATION TO OPINIONS BELOW

The plurality and dissenting opinions of the Court of Criminal Appeals are not officially reported, but are annexed as Appendix A, entered on June 21, 1989. A Motion for Rehearing was filed and was denied, without opinion, on September 13, 1989. The Court of Criminal Appeals granted a stay of the mandate in order to Petition the United States Supreme Court, said stay to expire on November 27, 1989 (Texas rules only allow one stay by the Court of Criminal Appeals). The opinion of the Court of Appeals is not published, but is annexed as Appendix B.

JURISDICTION

Jurisdiction is alleged under 28 U.S.C., Sec. 1257, in that the Texas statute on sentencing as interpreted by the Texas Court of Criminal Appeals violates Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. In affirming Petitioner's judgment of

conviction and sentence, the Court of Criminal Appeals held that proof of specific instances of good conduct were not admissible at the punishment hearing, although the Code of Criminal Procedure appeared to allow proof of character and the rules of evidence provided that proof of specific instances of conduct were admissible to prove character.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments V, VI, and XIV, are involved:

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; no deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Texas Code of Criminal Procedure

Article 37.07, Section 3, Code of Criminal Procedure of the State of Texas (prior to amendment in 1985):

Sec. 3. Evidence of prior criminal record in all criminal cases after a finding of guilty

(a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged.

Article 38.02, Code of Criminal Procedure of the State of Texas (repealed in 1986 when the Rules of Criminal Evidence were adopted):

The rules of evidence prescribed in the statute law of this State in civil suits shall, so far as applicable, govern also in criminal actions when not in conflict with the provisions of this Code or of the Penal Code.

Texas Rules of Civil Evidence

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Texas Rules of Criminal Evidence

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. Provided however that in order to be competent to testify concerning the character or trait of character of the accused, a witness must, prior to the date of the offense, have been substantially familiar with the reputation of the accused. In all cases where testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

STATEMENT OF THE CASE

The Petitioner pleaded guilty to second degree felony theft, the offense occurring on January 15, 1980. Guilt was not in issue at trial, nor in this Petition. During the punishment stage of the trial, the State was allowed to present a great deal of evidence of specific acts of conduct of the Petitioner which were alleged to have occurred more than three years after the offense. Yet, the trial court refused to allow the Petitioner to present any opinion evidence of character and refused to allow any proof of specific acts of conduct by the Petitioner as evidence of character. Sua sponte, the trial court admonished all of Petitioner's character witnesses that they could only testify as to reputation, and further restricted the reputation questions to "peaceful and law abiding" and "truth and veracity".

Petitioner's counsel vigorously objected and, when the trial court refused to reconsider his ruling, asked to make a Bill of Exceptions as to the testimony of the witnesses. The trial court, contrary to Texas law, refused to allow such a bill to be made until after the case went to the jury. In order to preserve

the point of error, short summaries of testimony of six of the fourteen witnesses were reduced to formal Bills of Exceptions and presented to the trial court as the case proceeded on appeal.

The Court of Appeals, Eighth Judicial District of Texas, held that the law as to character evidence was unclear, but opined that the testimony of reputation was not so different from the content of the short summaries as to constitute grounds for reversal. Until this opinion, the statutes, rules of evidence, and case law indicated that such testimony should have been admitted. Petitioner complained that such a construction of the law violated Petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

The Texas Court of Criminal Appeals, the court of last resort in Texas for criminal cases, granted discretionary review. On review, the Court of Criminal Appeals, relying upon a decision announced the same day, opined that proof of specific instances of conduct was not admissible as proof of character.

The Court of Criminal Appeals further held that the while the trial court's exclusion of the opinion testimony of character of the Petitioner was error, it was harmless beyond a reasonable doubt.

THE QUESTION PRESENTED IS SUBSTANTIAL

This Petition presents the most fundamental right of an accused in a criminal case, the right to present evidence on his own behalf. In the punishment or sentencing phase of a criminal trial, often the only evidence that an accused will present is of his character; why his sentence should be less that the maximum authorized by law. The trial court in this case, refused to allow any proof of character, and limited the Petitioner to sterile proof of reputation. Under Texas law, both statutory and by rules of court, the restriction violated the clear requisites of the law and the judgment should have been reversed. The Court of Appeals and the Court of Criminal Appeals adopted an extremely restrictive reading of the statutes and rules and such a strict interpretation violates fundamental Constitutional rights to a fair trial and due process of law.

While this Court has yet to decide the issue here presented in a non-capital case, the Court in a number of cases involving the death penalty has repeatedly recognized the importance of the ability of the accused to present evidence

on his own behalf. Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). The Court has also recognized the importance of the accused's right to present evidence on his own behalf. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972). Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

PRESERVATION OF CONSTITUTIONAL QUESTION

Petitioner made a proper objection at trial to the exclusion of evidence. Petitioner, in his Motion for New Trial to the trial court, pointed out that he was denied due process and a fair trial:

> The Trial Court materially erred in restricting the testimony of the Defendant's witnesses in their testimony of the character of the Defendant. Character of the Defendant is specifically in issue in the punishment phase of a criminal trial in arriving at an appropriate punishment. The prosecution had introduced evidence of alleged specific acts of misconduct, opening the door to this type of evidence, even though the Defendant asserts it is admissible anyway. The attorney for the State conducted a wholesale attack upon the character of the Defendant, from which the Trial Court refused to permit the Defendant to adequately respond.

On appeal to the Court of Appeals, Petitioner raised the point that the statutes and rules were designed to promote a fair trial and allow a defendant to exercise his Constitutional right to present evidence on his own behalf. When the Court of Appeals rendered a restrictive interpretation of the rules and statutes, the first point in the Motion for Rehearing was the claim of Constitutional error.

The Court of Criminal Appeals of Texas, after denying relief on the basis of an opinion rendered the same day, Murphy v. State, 777 S.W.2d 44, (Tex.Cr.App. 1989), remarked on the significance of the questions presented by this case, while avoiding discussion of the issue:

> Appellant also urges a Due Process violation involving a restriction on his constitutional right to present evidence in mitigation of punishment under the restrictive Murphy reading of Art. 37.07, Sec. 3(a). Although such an argument presents interesting and provocative issues, it was not argued at trial or on direct appeal but was only urged for the first time in his motion for rehearing. Thus, this question, not having been raised or addressed by the court below, is waived as untimely.
>
> Footnote 3, Opinion on Appellant's Petition for Discretionary Review, Appendix A-5.

In fact the issue had been raised on direct appeal, merely avoided by the Court of Appeals. Petitioner quoted Cass v. State, 676 S.W.2d 589, (Tex.Cr.App. 1984) finding that an exclusion of the testimony of five witnesses to violate fundamental fairness. Petitioner also cited Robinson v. State, 548 S.W.2d 63 (Tex.Cr.App. 1977) and quoted therefrom:

> "To allow only the State to present such evidence would deny a defendant his rights under Article

37.071, supra, and the Constitution of the United States as construed by the Supreme Court in the Jurek case."

548 S.W.2d 63, at 65-66

The Petitioner urged that the statutes and rules of evidence were designed to insure a fair trial and due process nf law. When the statutds and the rules of evidence are ignored by the trial court, a deprivation of fundamental rights has occurred, not just a deviation of procedural form. Only when the Court of Appeals interpreted the rules and statutes in a restrictive fashion did the Constitutional error become readily apparent. Only when the statute or rule is unduly restricted to the point that Constitutional rights are impaired does a Constitutional complaint arise. That restriction was firmly applied on the same day as the Opinion in this case, when the Court of Criminal Appeals handed down its decision in Murphy v. State, 777 S.W.2d 44, (Tex.Cr.App. 1989).

In Murphy, the Court of Criminal Appeals held that it was reversible error for the trial court to allow proof of acts of misconduct during sentencing, when the acts were not evidenced by final, criminal convictions. The State had argued

that proof of specific instances of conduct were admissible as proof of character. The Court of Criminal Appeals held that proof of specific instances of conduct were not admissible at all as proof of character:

> [W]e hold that Article 37.07, Sec. 3(a), supra, precludes admission of specific conduct to show character or anything else under the rubric of circumstances of the offender at the punishment phase of trial, either in mitigation or aggravation of punishment."
>
> Murphy v. State, 777 S.W.2d 44 (Tex.Cr.App. 1989)

Only when the Court of Criminal Appeals made its restrictive interpretation of Article 37.07, Sec. 3(a), and ignored Rule 405(b) of the Rules of Evidence, did the statute violate Constitutional rights. Even the opinion in this case emphasized the impact of the Murphy decision:

> In Murphy v. State, ___ S.W.2d ___, No. 102-86 (Tex.Cr.App. ____ 1989)(Opinion on Rehearing), this Court overruled a substantial amount of case law to hold that specific instances of conduct, even when offered as relevant to a defendant's application for probation, are generally admissible.
>
> Opinion on Appellant's Petition for Discretionary Review, Appendix A-4

Under this Court's holding in Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), Petitioner's Constitutional claim was properly preserved.

ARGUMENT FOR GRANTING PETITION

Petitioner's case has taken a strange and twisting path on its journey to this Court. First, the trial court admonished Petitioner's witnesses without any request from the State that their testimony be limited. The trial court, sua sponte, called the witnesses for the defense before the court and admonished them as to the scope of their testimony:

> Ladies and gentlemen, Mr. Wales has informed me that you have been summoned here as character witnesses. Now, a character witness is a very restricted kind of a witness. You are not going to testify about the facts in the case. You are limited to testifying about whether you know the defendant, what [are] the circumstances under which you know him, and then the question do you know his reputation. That does not mean what is your personal opinion, but do you know his reputation for--if the question is asking for his reputation for truth and voracity [sic] in the community in which he lives, your answer to that has to be either yes or no. You can't elaborate.

> Then the question is that reputation good or bad, and your answer has to be good or bad, and you can't elaborate on your answer.
>
> Statement of facts, Vol. IV, pp. 389-390, quoted in the Opinion on Appellant's Petition for Discretionary Review, Appendix A-2-3

The Court of Criminal Appeals acknowledged that Petitioner properly objected to this restriction on the testimony of the witnesses. The Court of Criminal Appeals characterized the challenge:

> Appellant's present challenge to the trial court's limitation of defensive character testimony is basically two-fold: that the court erroneously precluded (1) testimony concerning specific instances of good conduct and (2) opinion testimony. We will uphold the trial court's ruling in the former but the ruling as to the latter is erroneous.
>
> Opinion on Appellant's Petition for Discretionary Review, Appendix A-4

A second strange twist is that the Court of Criminal Appeals ignored its own rules of evidence. The Court of Criminal Appeals has promulgated Rules of Criminal Evidence which clearly provide:

> Rule 405(b): Specific instances of conduct. In cases in which character or trait of character of a person is an essential element of a charge,

> claim, or defense, proof may also be made of specific instances of his conduct.

Nowhere in the Opinion on Appellant's Petition for Discretionary Review is Rule 405(b) mentioned. Nowhere in the Murphy opinion, upon which the Court of Criminal Appeals relies, is Rule 405(b) mentioned. At the time of trial, the Rules of Civil Evidence were in effect and were applicable to criminal cases by virtue of Article 38.02, Texas Code of Criminal Procedure. Purtell v. State, 761 S.W.2d 360, 369 (Tex.Cr.App. 1988). The glaring inconsistency is never reconciled, or even recognized.

The third strange twist is that the Court of Criminal Appeals ignores part of its express holding in Murphy; admissibility in response to the State's evidence. In the instant case, the State had presented specific instances of conduct, occurring some three years after the date of the offense, as part of its case in chief. Petitioner's attempt to provide testimony of his own in response was squelched by the trial court. The Court of Criminal Appeals never mentioned this basis for admission for the testimony, although the Murphy

decision specifically recognized such a ground for admission of the testimony:

> Likewise, an accused can prevent the State from proving in the first instance unadjudicated bad acts or the details of crime resulting in convictions as a basis for urging the jury to deny probation or punish harshly. At its option, however, the opponent of such evidence may forgo objection with a view to eliciting other evidence of specific conduct to rebut it. By tendering the evidence in the first instance the proponent has in effect consented to admission of specific acts of conduct to inform the jury's discretion in deciding both what punishment to assess, and whether to recommend probation. He will not be heard to complain of rebuttal evidence of like kind.
>
> Murphy v. State, 777 S.W.2d 44 (Tex.Cr.App. 1989)

Thus, the very day it decided Petitioner's case, the Texas Court of last resort held that when one side opens the door by introducing evidence of specific conduct, like evidence from the other side is admissable.

The State was allowed to present much evidence of negative specific conduct which allegedly occurred three years prior to trial. In its Opinion, the Court of Criminal Appeals quotes portions of the State's evidence:

> After his return, appellant met with Hummel and proposed a plan for the repayment of the money. Following the meeting appellant appeared arrogant and bragged to another attorney, "they fell for it."
>
> Opinion on Appellant's Petition for Discretionary Review, Appendix A-26

Yet, nowhere does the Court of Criminal Appeals discuss its own, just announced, rule that what is fair for one side, is fair for both. Here, the Prosecution was given free rein to destroy Petitioner's character, yet he was limited to feeble questions of general reputation. The Court of Criminal Appeals has previously recognized the importance of due process in such circumstances:

> To allow only the State to present such evidence would deny a defendant his rights under Article 37.071, supra, and the Constitution of the United States as construed by the Supreme Court in the Jurek case.
>
> Robinson v. State, 548 S.W.2d 63, 65-66 (Tex.Cr.App. 1977)

When this case was decided below, such standards were abandoned and the Court of Criminal Appeals held that Petitioner could not present evidence of specific instances of

conduct in mitigation of punishment, even though the State had presented specific instances in aggravation.

Actions such as taken by the trial court in this case have been struck down by this Court in several death-penalty cases. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). The due process clause is applicable to all criminal prosecutions and sentencing, not just to capital cases.

The fourth strange twist to this case is its attachment to Murphy. The Court of Criminal Appeals had already rendered a decision reversing the conviction in Murphy when the State applied for rehearing. In its Motion for Rehearing, the State ***attached a copy of this Petitioner's Application for Discretionary Review*** to its Motion. The State professed that Petitioner's statement of the law was correct and *formally adopted* Petitioner's Application in its entirety. Petitioner's appeal became coupled with Murphy although the facts were

substantially different. In Murphy, the State called no witnesses at the punishment phase of its case in chief. The defendant offered no character witnesses, simply answered three questions: (1) that he was the person the jury had just found guilty; (2) that he had never been convicted of a felony; and (3) that he had never been placed on felony probation. The State asked him no questions. At this point, in rebuttal, the State was allowed to present five witnesses to testify as to specific conduct in the form of unadjudicated offenses. These facts are remarkably different from those in Petitioner's case where the State had already presented specific instances of conduct and the trial court refused to allow Petitioner to present his own witnesses as to character.

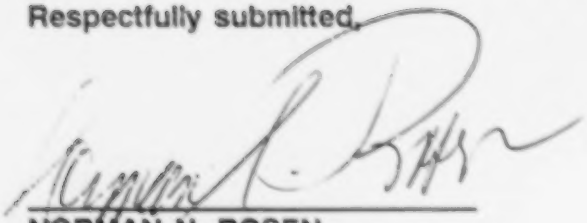
Petitioner argued that the State had confessed error, however, the Court of Criminal Appeals ignored this argument as well. The summary of the decision of the Court of Criminal Appeals is that a justice, who dissented in the Murphy decision, issued a plurality opinion in which two other justices joined, holding: (1) that proof of specific instances of conduct

is not admissible as character evidence under Murphy; but (2) ignored the specific language of Rule 405(b) of the Rules of Criminal Evidence and a similar provision in the Rules of Civil Evidence; (3) refused to rule on the Constitutional issue of due process and fair trial; (4) refused to consider the evidence as responsive to evidence of a similar form already presented by the State; and (5) ignored the State's confession of error in its Motion for Rehearing in Murphy. Three other justice concurred in the result without opinion. Two justices dissented, one of whom filed an opinion; and one justice abstained. The Court found the trial court had erred, and over dissent, declared such error harmless beyond a reasonable doubt.

REQUEST FOR RELIEF

WHEREFORE, Petitioner requests this Court to grant review and issue its Writ of Certiorari and, upon review, to reverse the sentence in this cause and remand this proceeding for a new trial.

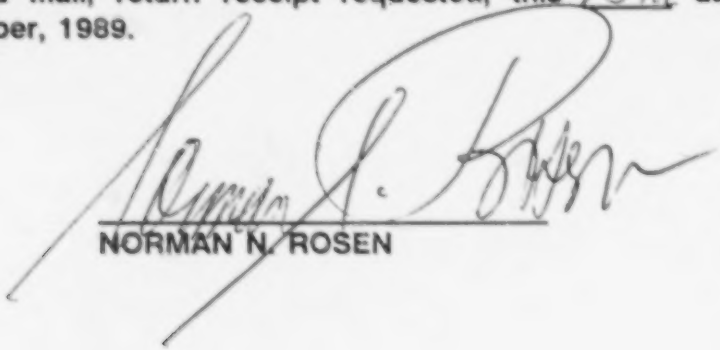
Respectfully submitted,



NORMAN N. ROSEN
Attorney for Petitioner
120 North Florence
El Paso, Texas 79901
(915) 532-3544
State Bar No. 17254000

CERTIFICATE OF SERVICE

I hereby certify that I have delivered a true and correct copy of the above and foregoing to the District Attorney, 34th Judicial District, 3rd Floor, City-County Building, El Paso, Texas 79901, by hand delivery; and to the State Prosecuting Attorney, P.O. Box 12405, Austin, Texas 78711, by United States mail, certified mail, return receipt requested, this 13th day of November, 1989.



NORMAN N. ROSEN